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No. 90-704

In The

Supreme Court of the United States

October Term, 1990

SOUTHERN BELL TELEPHONE AND TELEGRAPH COMPANY,

Petitioner,

vs.

STEVEN W. HAMM, CONSUMER ADVOCATE FOR THE STATE OF SOUTH CAROLINA,

Respondent.

RESPONDENT'S BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI TO THE SUPREME COURT OF THE STATE OF SOUTH CAROLINA

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RESTATED QUESTION PRESENTED

When a state Supreme Court applies an existing evidentiary requirement in accordance with well-established state law on the application of evidentiary rules, is a litigant denied procedural due process under the Fourteenth Amendment of the United States Constitution?

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STATEMENT OF THE CASE

In this case the South Carolina Supreme Court simply applied to the facts an evidentiary requirement already existing under South Carolina law. It correctly reversed South Carolina Circuit Court and South Carolina Public Service Commission (PSC) orders granting a Touch-Tone rate increase to Southern Bell Telephone and Telegraph Company (Petitioner). Petitioner had applied for the increase on September 17, 1987. The South Carolina Consumer Advocate (Respondent) intervened as a party of record. On January 13, 1988, the PSC held a hearing under the State's Administrative Procedures Act (APA) to consider the application. Petitioner offered one direct and one rebuttal witness in support of the increase. Respondent and Intervenor AT&T each offered a direct witness opposing it. Despite the scant evidence presented by Petitioner, however, the PSC issued its order on February 9, 1988, granting the proposed rate increase.

Petitioner based its proposed increase on a reallocation of future losses estimated to be sustained as a result of an earlier PSC ruling in another docket. The earlier ruling required all local exchange telephone companies to offer multi-jurisdictional WATS lines services as opposed to separate intrastate and

interstate WATS lines. The PSC order also provided that any local telephone companies that could demonstrate that they sustained a revenue deficiency as a result of this decision could seek approval of rate increases to offset the deficiency. In its order the PSC did not conclude, however, that any company, including Petitioner, would necessarily suffer any revenue deficiency, and no party appealed that order.

Based upon the PSC's initial WATS order, Petitioner applied for an increase in its Touch-Tone rates. In support of its application at the evidentiary hearing before the PSC, Petitioner attempted to meet its burden of proving the justness and reasonableness of its request by first sponsoring a direct witness who testified in support of the increase by referring to estimated revenue losses due to the PSC's earlier WATS order. The witness of Respondent Consumer Advocate testified that the increase was inappropriate, because it was based on speculation and unreliable estimates, and the AT&T witness stated the request was inherently discriminatory. The rebuttal witness of Petitioner then testified in an attempt to refute the Consumer Advocate witness's testimony and referred to a study to support his opinion as to the amount of these estimates, but neither Petitioner nor its rebuttal witness attempted to introduce the

study into the record. The PSC nevertheless granted the increase, and Respondent challenged that decision. Respondent thereafter appealed the circuit court's affirmation of the PSC's order in the South Carolina Supreme Court.

On May 7, 1990, the South Carolina Supreme Court reversed the circuit court and PSC. It concluded that the PSC's decision granting the Petitioner's rate increase request was not based on evidence of record by applying its long-standing substantial evidence rule in the South Carolina Administrative Procedures Act (§1-23-380(g)(5)) and by applying it in a manner consistent with several previous decisions. *Parker v. South Carolina Pub. Serv. Comm'n*, 281 S.C. 215, 314 S.E.2d 597 (1984); *Parker v. South Carolina Pub. Serv. Comm'n*, 288 S.C. 304, 342 S.E.2d 403 (1986); *Hamm v. South Carolin Pub. Serv. Comm'n and Piedmont Natural Gas Co. Inc.*, 295 S.C. 429, 368 S.E.2d 911 (1988); *Piedmont Natural Gas Co., Inc. v. Hamm*, S.C. , 389 S.E.2d 655 (1990); *Hamm v. Central States Health & Life Co.*, 292 S.C. 408, 357 S.E.2d 5 (1987); and *Hamm v. Central States Health & Life Co.*, 299 S.C. 500, 386 S.E.2d 250 (1989). It reversed the lower court without remanding the case (App. at 8(a)), since it had reviewed the record in reaching its conclusion and determined a remand would be

inappropriate and unnecessary due to both the lack of evidence and state precedent not allowing an applicant two bites at the apple to meet its burden of proof. Petitioner then filed a Petition for Rehearing, which the Court denied on August 1, 1990. Thereafter, on October 30, 1990, Petitioner filed its Petition for a Writ of Certiorari with the Court.

Even though the filing of the Petition for a Writ of Certiorari would usually suggest that the instant case has been concluded, it has not. Petitioner is continuing to avoid making refunds to customers by challenging in state court whether the Supreme Court really intended for refunds to be returned to customers. It recently prevailed in the lower court; therefore, on December 20, 1990, Respondent and the PSC filed a joint Notice of Appeal in the South Carolina Supreme Court.

SUMMARY OF ARGUMENT

The case before the Court concerns matters of state law concerning the substantial evidence rule and its application. Petitioner is trying to make a federal constitutional case out of a state law case in which the South Carolina Supreme Court upheld its well-applied substantial evidence rule. The Supreme Court also refused to remand the case, since there was no evidence of record and an applicant for a rate increase is not

entitled to two bites at the apple in proving its case.

Petitioner is contending as a matter of constitutional law that a new evidentiary rule, not itself challenged, was improperly applied to it in this case. Carrying this argument to its logical conclusion, however, would require continual relitigation of state cases whenever the issue is an applicant's failure to present enough evidence to support its rate proposals.

Neither party disputes that Petitioner had the burden of proving the reasonableness of its Touch-Tone rate increase. Under the State's APA an administrative regulatory decision in a contested case such as the instant one must be based on substantial evidence of record. Case law under the substantial evidence rule has developed since 1977 when the APA was enacted in South Carolina which requires that the underlying facts supporting a witness's opinion about a disputed issue must be in the record.

This Court should deny the Petition, because the South Carolina Supreme Court correctly and consistently applied the substantial evidence rule in the instant case and cited for support *Parker v. South Carolina Pub. Serv. Comm'n*, 281 S.C. 215, 314 S.E.2d 597 (1984)(*Parker I*). Petitioner fails to cite the subsequent case involving this same factual situation, same

parties, and same issues. In *Parker v. South Carolina Pub. Serv. Comm'n*, 288 S.C. 304, 342 S.E. 2d 403 (1986) (*Parker II*), the Court reiterated that in *Parker I* it had determined that Duke Power Company was not entitled to attempt to cure its failure to meet its burden of proof by introducing studies into the record in a later proceeding to support its request for a change in nuclear depreciation rates after reversal by the Supreme Court. It was not, in other words, entitled to two bites at the apple in attempting to prove its case. In addition to its strained construction of *Parker I* and its total failure to advise the Court of *Parker II*, Petitioner also ignores at least two other South Carolina Supreme Court cases decided before the instant case which demonstrate that the state court applied the same evidentiary rule in a like manner.

Finally, the only case cited by Petitioner to support its novel procedural due process argument is a case involving retroactive application of a criminal trespass statute. *Bouie v. City of Columbia*, 278 U.S. 347 (1964). The *Bouie* case is inapplicable to this case, however, since the substantial evidence rule was properly applied. *Bouie* is easily distinguishable because it involved review of a criminal statute in which this Court applied the more stringent substantive and procedural

due process requirements that the statute under review must itself give fair warning of the conduct that it constitutes a crime. *Id.* at 350.

The pending case, on the other hand, is a civil case involving having an adequate opportunity to meet existing burden of proof requirements. Not only did Petitioner have one opportunity in this case to meet its burden of proof, it is still seeking to keep the benefits of this unlawful increase in a later stage of this very case. It also has the right to seek Touch-Tone increases in the future. Petitioner's rights have been protected in accordance with previous state Supreme Court decisions.

REASONS WHY CERTIORARI SHOULD NOT BE GRANTED

I.

THE EVIDENTIARY REQUIREMENT THAT A STATE REGULATORY AGENCY'S DECISION MUST BE BASED ON SUBSTANTIAL EVIDENCE ON THE RECORD HAS PREVIOUSLY BEEN ESTABLISHED UNDER SOUTH CAROLINA LAW.

The South Carolina Supreme Court has consistently held that administrative findings must be supported by substantial evidence. *Lark v. Bi-Lo*, 276 S.C. 130, 276 S.E. 2d 304 (1981) and *Parker I*, *supra*. In addition, the law is clear that the utility, as an applicant, bears the burden of providing informa-

tion showing the reasonableness of its request before a state regulatory commission. 64 Am. Jur. 2d *Public Utilities* § 271 (1972) and *City of Akron v. Public Utilities Commission*, 55 Ohio St. 2d 155, 278 N.E. 2d 480 (1978). In the instant case, then, Petitioner had the burden of applying to the PSC for a Touch-Tone rate adjustment and justifying why ratepayers should have to bear the increase. Contrary to Petitioner's claims, the state court established no new evidentiary rule that was retroactively applied to Petitioner, as will be demonstrated below.

In 1977 the South Carolina General Assembly enacted the Administrative Procedures Act. S.C. CODE ANN. §1-23-10 *et seq*. (Law Co-op. 1976). Section 1-23-380 (g) states in part that an administrative agency's decision may be reversed or modified if its findings are not based on "substantial evidence on the whole record." S.C. CODE ANN. §1-23-380(g)(5). In 1981 the South Carolina Supreme Court in *Lark*, *supra*, stated that substantial evidence "is not a mere scintilla of evidence...but is evidence which, considering the record as a whole, would allow reasonable minds to reach the conclusion that the administrative agency reached or must have reached in order to justify its action." 276 S.E.2d at 306 (citing *Consolo v. Federal*

Maritime Commission, 383 U.S. 607, 620 (1966)). Several cases discussed below further clarify this principle of "substantial evidence on the whole record."

In footnote 3 at 5-6, Petitioner asserts that the South Carolina Supreme Court incorrectly cited *Parker I*, *supra*, as precedent for its ruling in the instant case. Petitioner is mistaken. According to the state court in *Parker I*,

> (T)he record in this case is, to say the least, inadequate to form the basis of an assessment of the factors necessary for a determination of a depreciation rate....Since there is no adequate factual basis for the 4% depreciation rate, the finding of the Commission in that respect is reversed.

314 S.E.2d at 599. In that case before the PSC, the applicant Duke Power Company had not made specific reference to any particular study to support its request to change its nuclear depreciation rate from 3.57% to 4.0%. However, on remand to the PSC Duke succeeded in convincing the PSC that it should construe *Parker I* to allow Duke to introduce studies into the record on remand that existed at the time of the initial proceeding but had not been referenced or introduced.

The Consumer Advocate vigorously protested that the PSC was restricted to evidence already on the record under *Parker I* or else Duke would improperly be allowed two bites at the apple -- two opportunities to meet its burden of proving

material, disputed issues that might very well thwart the Consumer Advocate's efforts to prevail on legal issues in court on behalf of the public. In *Parker II*, *supra*, the South Carolina Supreme Court agreed by stating, "unless this Court provides for the taking of additional evidence, no party may afford itself two bites at the apple. It was improper for the Commission to consider additional evidence." 342 S.E.2d at 405.

Petitioner next asserts that under the pre-APA decision of *Young v. Tide Craft, Inc.*, 270 S.C. 453, 242 S.E. 2d 671 (S.C. 1978) the factual underlying basis "must be *identified in* the record." Petition at 6 (Emphasis added). This is a misinterpretation of *Young*. The South Carolina Court in *Parker I* itself correctly cites *Young* as requiring an opinion to be supported by an "evidentiary showing." 314 S.E. 2d at 599. Essentially, the state APA codified this as requiring substantial evidence "on" the record rather than merely "identified in" the record as alleged by Petitioner.

In *Young* the South Carolina Supreme Court reversed the lower court's decision due, in part, to its reliance on opinion testimony of a witness. Instead of standing for the simple proposition cited by Petitioner from *Young* that the expert need not "set forth his calculations or detail the scientific or profes-

sional knowledge leading to his conclusions'' (Petition at 6; 242 S.E.2d at 678), the state court related this statement to facts that would not be understood by the jury. *Id.* Moreover, in rejecting the lower court's holding, the court continued,

> Neither should it be implied, however, that the complexity of the expert's area of knowledge relieves him of establishing, before the jury, the underlying basis for his opinion. However complex or esoteric the specialized knowledge the expert draws upon, he must show that in formulating his opinion, he has taken into consideration the material facts of the case being tried which was necessary to the formation of an intelligent opinion.
>
> * * *
>
> ...(D)espite Fowler's testimony that he could have mathematically rated each of the 'dominoes' as to its potential for danger, he made no attempt to ascertain the nature and extent ofthe operative, dynamic forces, nor did he attempt to scientifically determine the contribution, if any, of the individual 'dominoes' to ejection. Not having done so, it was impossible for Fowler to say with any reasonable degree of accuracy that the dynamic forces attributable to the alleged defects contributed to Young's ejection [from the boat in the accident] to the extent that ejection would not have occurred in the absence of the alleged defects.
>
> Having failed to establish an underlying factual basis taking into consideration the material facts necessary to the formation of an intelligent opinion, Fowler's testimony on causation is devoid of probative value and cannot support a verdict.

Id. at 678-9.

In the instant case, the underlying factual methodology was of crucial significance. Petitioner and Respondent both

presented testimony on the same issue and reached different conclusions. The PSC has been cited as the regulatory expert and, as such, has been held to a heightened duty to explain itself in addressing complex matters. *Hamm v. South Carolina Pub. Serv. Comm'n*, 298 S.C. 309, 380 S.E.2d 428 (1989). Petitioner's failure to offer any testimony with probative value made unnecessary a remand simply for more explicit findings. *Young* suggests that the underlying methodology, if credible, would have constituted substantial evidence. However, no underlying methodology was in the record. The South Carolina Supreme Court correctly cited *Parker I*, which in turn cited *Young*, for the proposition that an "evidentiary showing" was necessary. *Parker I*, 314 S.E. 2d at 599.

The instant case is also easily distinguishable from the lower appellate court decision of *Howle v. PYA/Monarch, Inc.*, 288 S.C. 586, 344 S.E.2d 157 (Ct. App. 1986). Petition at 6-8. Petitioner incorrectly cites *Howle* to suggest that "the evidence of interest is the opinion testimony, not the outside material." *Id.* at 7. It is true that for the first time in *Howle* the state court of appeals held that an appropriately qualified psychologist could testify as to diagnosis, prognosis, and causation of mental and emotional disturbance. 344 S.E.2d at 161. The appellate

court explained, however, that it was allowing this expert opinion testimony, based partially on information received from others, because: (1) the facts and data are "of a type reasonably relied upon by experts in the particular field in forming opinions or inferences upon the subject" (*Id.* at 162 (Citations omitted)) and (2) the information received "was not being offered for the truth of the matters asserted therein; rather it was merely mentioned as one of the bases of Bixler's diagnosis." *Id.*

Factors distinguishing *Howle* from this case include: (1) the failure to have Petitioner's witness specifically qualified as an expert; (2) competing testimony on the same issue reaching opposite conclusions; (3) the fact that the underlying factual evidence was available to Petitioner and only subject to discovery by Respondent rather than "of a type reasonably relied upon"; (4) even if the information would have otherwise qualified to be of this type, Petitioner made no showing to this effect; and (5) the opinion testimony of Petitioner's witness was offered to establish the truth of the matters asserted.

This Court should find Respondent's argument persuasive, especially given the state court of appeals' own application of *Howle*. In *Campbell v. Paschal*, 290 S.C. 1, 347 S.E.2d 892

(Ct. App. 1986), the appellate court cited *Howle* for the principle of allowing expert testimony based partially on information received from other sources if such facts and data are "of a type reasonable relied upon by experts in the particular field in forming opinions or inferences upon the subject." *Id.* at 901. However, rather than information uniquely available only to one party, the appellate court instead upheld use of opinion testimony to project economic loss partially based on economic and statistical data of the kind relied on by economists seeking to project economic loss. In that case the information consisted of such things as "work life expectancies, wage growth rates, interest rate trends, income tax rates, and the like" from government documents which "originated with the United States Department of Labor, the Internal Revenue Service, the South Carolina Employment Security Commission, the Veteran's Administration, and the Federal Reserve System." *Id.* This type of information is obviously of a different category of more readily available data rather than data based only on Petitioner's subscribers' predicted usage patterns and other unknown assumptions. In fact, in *Campbell*, the trial judge took notice that the government publications "are accurate." *Id.* In short, both

Howle and *Campbell* are consistent with the *Parker* line of cases.

Petitioner places undue reliance on the state court's reference to the "study" mentioned by Petitioner's witness at the administrative proceeding. Petition at 5,7-8; App. at 8a. Contrary to Petitioner's claims, *Parker I* and *Parker II* each demonstrate that the fundamental principle followed in the instant case was that the evidence supporting a request must not simply be conclusory opinion but must consist of sufficient, credible factual information "on" the record.

Through its reversal in the instant case, the state court properly determined that Petitioner's request was not based on substantial evidence of record. By noting that the "study" was not introduced into evidence, the court stated it was unnecessary simply to remand the case for the PSC to attempt to articulate its findings (also alleged by Respondent to be inadequate). The Court did not state that introduction of the "study" in itself would have cured the inadequacy of the evidence to support the Touch-Tone rate application. It simply determined that remanding the matter for the PSC to set forth more explicit findings required under S.C. Code Ann. §1-23-350 would obviously only waste time given the lack of evidence on the

record. The Touch-Tone increase request was, therefore, obviously viewed by the court as requiring underlying facts, given applicable South Carolina case law; APA evidentiary requirements; the complex mathematical nature of the matter to be proved; and contradictory opinions of witnesses as to the truth of the matter asserted.

At least two other cases decided prior to the instant case provide additional support for the argument that the state court has simply followed a previously existing evidentiary rule herein. In *Hamm v. Central States Health & Life, Co.*, 292 S.C. 408, 357 S.E.2d 5 (1987)(*Central States I*), the South Carolina Supreme Court reversed the portion of the Chief Insurance Commissioner's administrative order granting a health insurance increase based on a "medical intensity" factor. The company's witness had given his opinion as to the appropriateness of the increase attributable to this factor and had introduced the results of a study published several years earlier to support his opinion. 357 S.E.2d at 5-6. However, the court adopted the Consumer Advocate's argument that "(n)o substantial evidence was presented by Central States as to the current impact of 'medical intensity'". *Id.* at 6. The court continued by stating that the Insurance Department witness's testimony that he could

not say exactly how the intensity level had changed since 1981 rendered his opinion without probative value,

> since there was no evidentiary showing of the facts upon which his opinion was predicated. *See Parker v. South Carolina Public Service Commission*, 281 S.C. 215, 314 S.E.2d 597 (1984), *modified*, 288 S.C. 304, 342 S.E.2d 402 1980).

357 S.E.2d at 6. In light of the reference by the court in *Central States I* to its modification of *Parker I* in *Parker II*, it is clear that the court was apprising regulated utilities and insurance companies that rate increase requests must be based on evidence with underlying facts in the record and that failure to do so would render any resulting rate approved by the PSC unlawful and subject to refund from the date of approval.

The state court also followed this evidentiary approach in evaluating the burden of proof standard in *Piedmont Natural Gas Co., Inc. v. Hamm*, S.C. , 389 S.E.2d 655 (1990)(*Piedmont II*). In *Piedmont II*, also decided prior to the instant case on February 20, 1990, the South Carolina Supreme Court reversed the circuit court order requiring the PSC to reopen the evidentiary record to allow Piedmont to introduce additional evidence it had failed to introduce at the administrative hearing.

On remand from the state Supreme Court[1] the PSC had followed the ruling of that court reversing its first order which granted an increase in natural gas rates, based in part on retention factors a Piedmont and PSC Staff witness contended were appropriate. In *Piedmont II* the Supreme Court cited *Parker I* for the proposition that Duke's nuclear depreciation rate of 4% had "no evidentiary support" and therefore violated the substantial evidence rule. 389 S.E.2d at 657. It then "reversed" the case and cited *Parker II* as to the application of the evidentiary rule therein to mean that no new hearing was appropriate for the admission of additional evidence and that refunds were necessary from the date of approval of the unlawful rate established by the PSC. *Id.*

All of these cases show that the South Carolina Supreme Court had ample precedent to apply in reaching its decision in the instant case. The Petitioner had the burden of proving the reasonableness of its Touch-Tone rate increase and failed to do so. It is not entitled to more than one opportunity to prove its case. The Court should, therefore, deny the Petition.

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[1] *Hamm v. South Carolina Pub. Serv. Comm'n and Piedmont Natural Gas Co., Inc.*, 295 S.C. 429, 368 S.E.2d 911 (1988) (*Piedmont I*)(remanding rate case to PSC to "substantiate the record and include in its order the basis for the adoption and approval of the use of retention factors.")

II.

THE SOUTH CAROLINA SUPREME COURT CORRECTLY AND CONSISTENTLY APPLIED SOUTH CAROLINA LAW IN REVERSING THE SOUTH CAROLINA CIRCUIT COURT AND PUBLIC SERVICE COMMISSION, AS WELL AS IN DENYING SOUTHERN BELL'S SUBSEQUENT PETITION FOR REHEARING.

Assuming for purposes of argument that the references to the "study" established some new substantial evidence rule, its application would still be sound under *Parker II* and subsequent case law. Petitioner concedes it is not challenging the wisdom of the rule, only its application. Petition at 6 and n. 8 at 11-12. Yet it has overlooked *Parker II* not only as to the earlier viability of the evidentiary rule itself but also as to the application of procedural due process requirements and instead cites only the criminal case of *Bouie v. City of Columbia*, 378 U.S. 355 (1964) to support its novel constitutional argument.

Aside from the consistent substantial evidence rule endorsed, the South Carolina Supreme Court in *Parker II* made it abundantly clear that a PSC order it ultimately reverses is unlawful and refunds or credits with interest are to be awarded to ratepayers from the time of the appeal on the successfully challenged issues. As the Court noted in *Parker II*:

> Due to Duke's failure to present adequate evidence, the 3.57% depreciation rate remained in effect. We must, therefore, determine the appropriate time period for

> which refunds, credits or other rate adjustments are due. Ratemaking is a prospective process, not a retroactive one. *South Carolina Electric and Gas Co. v. Public Service Commission*, 275 S.C. 487, 272 S.E.2d 793 (1980). Any rate increases must be applied prospectively. Duke cannot be permitted to increase its rates in October 1979 based on evidence that was not presented until almost five years later [in a subsequent rate case docket not on appeal]. Until an adequate evidentiary basis was established to support an increase, the 3.57% rate should have remained in effect.
>
> * * *
>
> On remand, the Commission is ordered to authorize a 3.57% nuclear depreciation rate for Duke from October 1, 1979 through January 27, 1981. It was not until the Commission issued a subsequent unappealed order on January 28, 1981 that the 4% nuclear depreciation rate became effective. The Commission is required to order Duke to make the appropriate refunds or adjustments in rates reflecting the same.

342 S.E.2d at 405-6.

From this excerpt from *Parker II*, it is readily apparent that the South Carolina Supreme Court has previously determined that if an applicant fails to meet its burden of proof to justify a rate increase, procedural due process requirements do not mandate that the utility retroactively gets a second chance to meet its burden. The court ordered refunds from the date of the Consumer Advocate's appeal of the PSC order, even though no stay of the PSC order had been sought, since the court had found the rate to have been unlawful. *Id.* at 405-6. If the court had failed to provide the Consumer Advocate and ratepayers relief

from the date of approval of a rate found to have been unlawful, it would have violated both their procedural and substantive due process rights, not Petitioner's.

Therefore, even if this Court disagrees with Respondent's argument that no new rule was established in the instant case, the Court should still deny the Petition, because there was no denial of procedural due process due to its retroactive application. It would only have been improperly and retroactively applied if the state court had, for example, attempted to require a refund of an earlier, lawful Touch-Tone rate increase granted by the PSC that was not on appeal. *See South Carolina Electric and Gas Co. v. Pub. Serv. Comm'n*, 275 S.C. 487, 272 S.E.2d 793 (1980).

In the *Bouie* case cited by Petitioner, minority sit-in demonstrators were abruptly confronted with a "No Trespassing" sign stretched across the lunch counter after their arrival at an Eckerd's Drugstore in Columbia. They were given no notice that their conduct of sitting quietly thereafter at the counter would be considered violative of the statute. With criminal liability at issue, this Court properly held as violative of the defendants' substantive and procedural due process rights the retroactive application of a new judicial construction of a

criminal trepass statute. 378 U.S. at 350-1.

Petitioner cites *Bouie* in which this Court quotes *Brinkerhoff-Faris Trust & Savings Co. v. Hill*, 281 U.S. 673, 677-8 (1930), to support its argument that criminal due process requirements have been extended to civil cases such as the case before the Court. However, contrary to Petitioner's claim that *Brinkerhoff-Faris Trust & Savings Co.* supports its due process position, this Court stated:

> It is true that the courts of a State have the supreme power to interpret and declare the written and unwritten laws of the State; that this Court's power to review decisions of state courts is limited to their decisions on federal questions; and that the mere fact that a state court has rendered an erroneous decision on a question of state law, or has overruled principles or doctrines established by previous decisions on which a party relied, does not give rise to a claim under the Fourteenth Amendment or otherwise confer appellate jurisdiction on this Court.

281 U.S. at 680 (Footnotes omitted). Therefore, even if one concedes the Supreme Court of South Carolina rendered an erroneous decision on state law or overruled a principle or doctrine established by previous decision on which Petitioner relied, this does not give rise to a Fourteenth Amendment claim or otherwise confer jurisdiction on this Court. Furthermore, in the case *sub judice* Petitioner has not alleged any substantive due process violation and, in fact, is still trying to avoid

returning funds to ratepayers in the instant case now pending before the South Carolina Supreme Court.[2]

Given the *Parker I* and *II* decisions, the *Central States I* decision, and the *Piedmont I* and *II* decisions discussed thus far, it is clear that Petitioner is attempting to mislead this Court by even filing this Petition for Writ. Together these decisions clearly demonstrate that Petitioner's reliance on *Bouie* and *Brinkerhoff-Faris* is misplaced and that the Petition should be denied. However, at least one additional case makes clear that the South Carolina Supreme Court has not violated any of Petitioner's procedural due process rights.

The instant case was heard by the South Carolina Supreme Court on January 22, 1990; on October 30, 1989, the South Carolina Supreme Court had handed down another applicable decision, *Hamm v. Central States Health and Life, Co.*, 299 S.C. 500, 386 S.E.2d 250 (1989)(*Central States II*). In *Central States II* the state court heard the Consumer Advocate's

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Petitioner's theory is that since the Supreme Court "reversed" the case instead of using the phraseology "reversed and remanded", consumers are not entitled to refunds. However, it should be noted that the Supreme Court used the same terminology in *Piedmont II* (389 S.E.2d at 657) and consumers received refunds calculated from the date of the unlawful increase previously granted by the PSC.

appeal after reversal and remand by the court of the Chief Insurance Commissioner's granting of an increase based in part on a "medical intensity" factor for which no substantial evidence had been presented on the record. *See*, *infra*, at 16. At issue were: (1) the legality of the Commissioner's order on remand that failed to provide for refunds from the date of the increase previously found by the court to have been unlawful and (2) the authority of the Commissioner to order health insurance refunds.

In this second appeal involving the same rate increase application, the South Carolina Supreme Court reversed both the circuit court's affirmation of the Commissioner's order on remand and the Commissioner's order. The court found the Commissioner did, indeed, have authority to order refunds. 386 S.E.2d at 252-3. The court also expressly rejected the argument of Central States that *SCE&G*, *supra*, supported its position that requiring refunds from the date of the increase order, albeit found to have been unlawful, would amount to retroactive ratemaking. According to the court,

> *SCE&G* is easily distinguished from the present case. In *SCE&G*, we held that the PSC had no authority to direct refunds pursuant to past-approved lawful rates. We reasoned that to have empowered the PSC to direct

> refunds in *SCE&G*, would have permitted them to engage in retroactive ratemaking. Under the present facts, the rates approved by the Commissioner were found to be *unlawful*. As such, a refund in this instance would not be considered retroactive ratemaking.
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> * * *
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> ...[I]n the situation before us, the Commissioner would not be engaging in retroactive ratemaking by ordering refunds where the approved rates were appealed and found to be unlawfully established.
>
> Finally, Central States submits that the *Parker* cases are inapplicable to this case because the statutory authority and specific powers of the PSC are different from the powers held by the Commissioner. This argument is without merit. While we acknowledge that the powers held by the PSC and the Commissioner are different, the same logic and principles of the *Parker* cases apply here. That is, when a regulated company requests a rate increase which is approved by the regulating authority, but timely appealed and found to be unlawfully established, that company cannot keep funds to which it was never entitled. This is a matter of public policy and such reasoning would apply no matter what regulated industry is involved.

386 S.E.2d at 253-4 (Emphasis in original). The *Central States II* holding provides conclusive support for Respondent's argument that this Court should deny the Petition. In *Central States II* the state court went so far as to cite the *Parker* cases discussed herein and apply them there as it has done in the instant case. Moreover, in the instant case, Petitioner has not even contested the PSC's authority to order refunds. This case, therefore, clearly does not warrant review by this Court.

CONCLUSION

The cases cited herein to support Respondent's opposition to the Petition demonstrate that the South Carolina Supreme Court in the instant case has properly and consistently applied the substantial evidence rule. There was no new evidentiary rule established and it was not applied retroactively to Petitioner. Petitioner simply failed to meet its burden of proving the reasonableness of its Touch-Tone rate increase. For these reasons, and for the other reasons set forth herein, the Petition for Writ of Certiorari should be denied.

Respectfully submitted,

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